

# Staff Summary Report

REVISED



**Council Meeting Date:** 12/04/03

**Agenda Item Number:** 25

**SUBJECT:** Request approval of the Option to Purchase and the Purchase and Sale Agreement and Escrow Instructions between Union Pacific Railroad Company and the City of Tempe.

**DOCUMENT NAME:** 20031204casv07 **TRANSPORTATION PLANNING (1101-01)**

**SUPPORTING DOCS:** Yes

**COMMENTS:** Request approval by the City of Tempe to acquire real property interests in the First Street Option Property from Union Pacific Railroad Company. The First Street Property is a strip of land which commences at the north property line of the City's 5<sup>th</sup> Street and Farmer Avenue parking lot and parallels Union Pacific's main railroad line north until it terminates within Tempe Beach Park.

**PREPARED BY:** Larry Schmalz, Senior Planner (Ext. 8924)

**REVIEWED BY:** Melanie Hobden, Development Services Manager

**LEGAL REVIEW BY:** Marlene A. Pontrelli, City Attorney (Ext. 8120)

**FISCAL NOTE:** The total acquisition cost is \$550,000, a \$50,000 initial payment, with the balance due when the City exercises the option to purchase. The cost of the acquisition will be paid from the General Fund CIP reserve.

**RECOMMENDATION:** Authorize the Mayor to execute the Purchase and Sale Agreement and Escrow Instructions between Union Pacific Railroad Company and the City of Tempe.

**ADDITIONAL INFO:** The City Council previously authorized staff at the December 19, 2002 Council Meeting, Agenda Item #16 to acquire several properties from Union Pacific Railroad. The acquisition of the First Street Option Property is one of the items previously approved.

## OPTION TO PURCHASE REAL PROPERTY

### FIRST STREET PROPERTY

This Option Agreement ("**Agreement**") is made as of December 19, 2003, by and between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("**Union Pacific**"), and CITY OF TEMPE, a municipal corporation created under the provisions of Arizona law ("**Tempe**").

### RECITALS

- A. Union Pacific holds an interest in certain real property situated in Maricopa County, Arizona, described in **Exhibit A**, attached hereto and incorporated herein (together with any and all improvements, the "**Property**").
- B. Tempe desires to acquire the exclusive right to purchase Union Pacific's interest in the Property at an agreed price and under the specific terms in this Agreement.

### AGREEMENT

For good and valuable consideration, the receipt and adequacy of which are acknowledged, the parties agree as follows:

- 1. Option to Purchase. Union Pacific grants to Tempe an option to purchase Union Pacific's interest in the Property on the terms and conditions of this Agreement and in the Purchase and Sale Agreement attached as **Exhibit B** and incorporated herein ("**Purchase Agreement**").
- 2. Consideration for Option; Purchase Price. Concurrently with the execution of this Agreement, Tempe has paid to Union Pacific as consideration the sum of Fifty Thousand Dollars (\$50,000) for the option. The foregoing option consideration shall be credited against the purchase price of the Property if the option granted under this Agreement is exercised. The purchase price of Union Pacific's interest in the Property will be Five Hundred Fifty Thousand Dollars (\$550,000).
- 3. Term. This Agreement shall be effective as of the date first above written and shall remain in effect for a period of one year ("**Option Term**"). Tempe may extend the Option Term for up to four (4) additional one-year periods upon paying Union Pacific \$50,000 for each such extension during the then-current Option Term. Said extension payments are non-refundable and will not be credited against the purchase price of the Property if the option granted under this Agreement is exercised.
- 4. Exercise. Provided Tempe is not in default under this Agreement, this option may be exercised by Tempe's delivering to Union Pacific before the expiration of the Option Term written notice of the exercise ("**Exercise Notice**"), which shall state that the option is exercised without condition or qualification. The Exercise Notice must be accompanied by two (2) copies of the Purchase Agreement executed by Tempe, with the first paragraph of the Purchase Agreement completed by insertion of the date on which the Exercise Notice is given.
- 5. Execution of Purchase Agreement. On receipt by Union Pacific of the Exercise Notice and two (2) copies of the Purchase Agreement executed by Tempe, Union Pacific shall promptly execute the Purchase Agreement and deliver an executed copy to Tempe.

Union Pacific's failure to execute and deliver a copy of the Purchase Agreement in accordance with this Section shall not affect the validity of the Purchase Agreement. The Purchase Agreement shall immediately be effective and binding on both Union Pacific and Tempe without further execution by the parties, on exercise of the option in accordance with Section 4.

6. Conveyance; Future Encumbrances. If this option is exercised by Tempe, Union Pacific will convey its interest in the Property by quit claim deed. During the Option Term and until the Property is conveyed to Tempe, if this option is exercised, Union Pacific will not encumber the Property in any material way nor grant any property or contract right relating to the Property without the prior written consent of Tempe, which consent shall not unreasonably be withheld or delayed.
7. Time of Essence. Time is of the essence for this Option Agreement. If the option is not exercised in the manner provided in Section 4 before the expiration of the Option Term, Tempe shall have no interest in the Property and the option may not be revived by any subsequent payment or further action by Tempe.
8. Quit Claim Deed. If this Agreement expires, Tempe agrees, if requested by Union Pacific, to execute, acknowledge, and deliver a quit claim deed to Union Pacific within ten (10) days after termination and to execute, acknowledge, and deliver any other documents required by any title company to remove the cloud of this option from the Property.
9. Representations and Warranties. Union Pacific hereby represents and warrants to Tempe as of the date of this Agreement, as follows:
  - a. Organization. Union Pacific is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and qualified to do business in Arizona.
  - b. Authority. Union Pacific has full statutory power and authority to enter into this Agreement, and the Related Agreements and, subject to necessary regulatory authority, to carry out the obligations of Union Pacific under this Agreement.
  - c. Due Authorization. This Agreement has been duly authorized, executed and delivered by Union Pacific. Neither the execution and delivery of this Agreement by Union Pacific, the consummation by Union Pacific of the transaction contemplated hereby, nor compliance or performance by Union Pacific with any of the provisions hereof, does or will violate any judgment, order, law or regulation applicable to Union Pacific or any provisions of Union Pacific's certificate of incorporation or by-laws or result in any material breach of, or constitute a material default under, or result in the creation of, any material liens, charge, security interest or other encumbrance upon the Property (other than created by this transaction) pursuant to any note, bond, indenture, mortgage, deed of trust, bank loan or credit agreement or other instrument to which Union Pacific is a party or by which any of the Property is bound.
  - d. Condemnation or Violations of Law. To the best of its knowledge, except (a) as set forth in **Exhibit D**, (b) for any matter related to Tempe, or (c) as previously

disclosed to Tempe in writing, Union Pacific has not received any written notice of any existing or threatened condemnation or material violation of law.

e. Hazardous Materials. To the best of its knowledge, except as disclosed in **Exhibit D**, Union Pacific has no knowledge of (a) any material release of a Hazardous Material, as defined in Section 3.1 of the Purchase Agreement, on or beneath the Property; (b) any receipt by Union Pacific of any written governmental notice that any of the Property is in violation, in any material respect, under any law, or other governmental or judicial requirement, relating to Hazardous Materials; (c) any existing, pending or threatened investigation by any governmental authority under or in connection with any law, or other governmental or judicial requirement, relating to Hazardous Materials; or (d) any other environmental assessment reports on the Property in the records of Union Pacific's Real Estate Department in Omaha, Nebraska or Union Pacific's Environmental Management Group in Omaha, Nebraska.

f. Litigation; Judgments. To the best of its knowledge, except as disclosed in **Exhibit D**, Union Pacific has no knowledge of any pending litigation, administrative action, governmental investigation, examination, claim or demand (including, but not limited to, environmental investigations, examinations, claims and demands) whatsoever, nor any judgments, orders or decrees entered in any lawsuits or proceedings, affecting the Property.

g. Senior Rights. Union Pacific has no knowledge that any tenant or other third party has any agreement or right granted by Union Pacific to purchase all or any part of the Property that is senior to Tempe's rights hereunder.

h. Union Pacific's Pre-Closing Deliveries. Union Pacific represents that, to the best of its knowledge, it has delivered to Tempe true and correct copies of any and all valuation maps, leases, licenses, and other agreements affecting the Property, and environmental studies and reports in effect for, or applicable to, the Property as of the date of this Agreement to the extent the same are in the records of Union Pacific's Real Estate Department offices in Omaha, Nebraska and Union Pacific's Environmental Management Group offices in Omaha, Nebraska. Union Pacific has no knowledge of (i) any tenancy or other agreements that materially affect Union Pacific's current use of the Property, other than the leases, licenses and other agreements delivered to Tempe; or (ii) any material defaults under any of such agreements by any party thereunder. To Union Pacific's knowledge, Union Pacific has no unfulfilled financial obligations to tenants or other parties under any of such agreements.

i. National Register of Historic Places. To Union Pacific's knowledge, none of the Property improvements owned by Union Pacific are listed on the National Register of Historic Places, or any comparable Arizona list.

j. Limitation on Representations and Warranties. As used in this Agreement, the term "to the best of its knowledge," means and refers only to the current, actual (not constructive) knowledge, without any duty of investigation or inquiry, of Brian Morrissey, General Director Real Estate, Norman D. Siler, Manager-

Environmental Site Remediation, Tony Love, General Manager Real Estate, Mark Schulte, Senior Real Estate Manager, Gregg Larsen, Manager Real Estate, Jerry Wilmoth, General Manager, Network Infrastructure, Jeff Asay, Assistant General Solicitor, and Gerry Sullivan, General Attorney (collectively, "Union Pacific's Representatives").

10. Notices. Any notice or other communication required or permitted to be given under this Agreement ("**Notices**") shall be in writing and shall be (i) personally delivered; (ii) delivered by a reputable overnight courier; or (iii) delivered by certified mail, return receipt requested and deposited in the U.S. Mail, postage prepaid. Telecopy notices shall be deemed valid only to the extent they are (a) actually received by the individual to whom addressed and (b) followed by delivery of actual notice in the manner described above within three (3) business days thereafter. Notices shall be deemed received at the earlier of actual receipt or (i) one (1) business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (ii) three (3) business days following deposit in the U.S. Mail, as evidenced by a return receipt. Notices shall be directed to the parties at their respective addresses shown below, or such other address as either party may, from time to time, specify in writing to the other in the manner described above:

Tempe:                      Tempe City Attorney  
                                 P.O. Box 5002  
                                 Tempe, AZ 85280  
                                 Telecopy: (480) 350-8645

Union Pacific:            General Manager Real Estate  
                                 1800 Farnam St.  
                                 Omaha, NE 68102  
                                 Telecopy: (402) 997-3601

With a copy to:          Real Estate Attorney  
                                 1416 Dodge Street, Room 830  
                                 Omaha, NE 68179  
                                 Telecopy: (402) 271-5610

11. Transfer. Tempe may not assign or transfer this Agreement and the rights under it without Union Pacific's prior written consent, which consent shall not unreasonably be withheld or delayed.
12. Attorney's Fees and Costs. If any legal or equitable action, arbitration, or other proceeding, whether on the merits, application, or motion, are brought or undertaken to enforce this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, then the successful or prevailing party or parties in such undertaking shall be entitled to recover reasonable attorney's and other professional fees, expert witness fees, court costs and other expenses incurred in such action, proceeding, or discussions, in addition to any other relief to which such party may be entitled. The parties intend this provision to be given the most liberal construction possible and to apply to any circumstances in which such party reasonably incurs expenses.
13. Memorandum of Option. Upon the close of escrow for this Option, Union Pacific will execute the Memorandum of Option Agreement attached to this Agreement as **Exhibit C**

and shall deliver it to Tempe, which may record it in the Official Records of Maricopa County, Arizona.

14. Successors. This Agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assignees of the parties to this Agreement.
15. Waivers. No waiver of any breach of any covenant or provision in this Agreement shall be deemed a waiver of any other covenant or provision in this Agreement, and no waiver shall be valid unless in writing and executed by the waiving party.
16. Construction. Section headings are solely for the convenience of the parties and are not a part of and shall not be used to interpret this Agreement. The singular form shall include the plural and vice versa. This Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if both parties have prepared it. Unless otherwise indicated, all references to sections are to this Agreement.
17. Third-Party Rights. Nothing in this Agreement, express or implied, is intended to confer on any person, other than the parties to this Agreement and their respective successors and assigns, any rights or remedies under or by reason of this Agreement.
18. Integration. This Agreement contains the entire agreement between the parties, and expressly supersedes all previous or contemporaneous agreements, understandings, representations, or statements between the parties respecting the option for the Property.
19. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.
20. Amendment. This Agreement may not be amended or altered except by a written instrument executed by Union Pacific and Tempe.
21. Partial Invalidity. Any provision of this Agreement that is unenforceable or invalid or the inclusion of which would adversely affect the validity, legality, or enforceability of this Agreement shall be of no effect, but all the remaining provisions of this Agreement shall remain in full force.
22. Exhibits. All attached exhibits are incorporated in this Agreement by this reference.
23. Authority of Parties. All persons executing this Agreement on behalf of any party to this Agreement warrant that they have the authority to execute this Agreement on behalf of that party.
24. Governing Law. The validity, meaning, and effect of this Agreement shall be determined in accordance with the laws of the State of Arizona.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation**

By: \_\_\_\_\_  
Tony K. Love,  
General Manager – Real Estate

**CITY OF TEMPE, a municipal corporation  
created under the provisions of Arizona law**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO LEGAL FORM

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**OPTION TO PURCHASE REAL PROPERTY**  
**FIRST STREET PROPERTY**

**List of Exhibits**

- Exhibit A      Legal Description**
- Exhibit B      Purchase and Sale Agreement and Escrow Instructions – First Street Property**
- Exhibit “A”    Print of Property**
- Exhibit “B”    Quit Claim Deed – First Street Property**
- Exhibit A      -Property Description*
- Exhibit B      Certification of Non-Foreign Status*
- Exhibit “C”    Property Materials**
- Exhibit “D”    Assignment and Assumption Agreement**
- Exhibit A      Legal Description of Property*
- Exhibit B      List of Leases and Licenses to be Assigned*
- Exhibit “E”    Certification of Non-Foreign Status**
- Exhibit C      Memorandum of Option**
- Exhibit A      Legal Description**
- Exhibit D      Property Disclosures**



## **EXHIBIT A**

### **UNION PACIFIC RAILROAD COMPANY Maricopa County, Arizona (First Street Property)**

A portion of the East half of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at the Southeast corner of said Section 16;

Thence along the East line of said Section 16, North 00° 17' 10" West, 2230.81 feet to a point on the Easterly prolongation of the South line of Lot 31E of "State Plat 12 Amended," a subdivision recorded in Book 69 of Maps, Page 38, Maricopa County Recorder, said point also being on the existing centerline of railroad track, and also being the Point of Beginning of a strip of land 100 feet in width, the Easterly line of which is described herein;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 17' 10" West, 409.00 feet to the East quarter corner of said Section 16;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 13' 45" West, 334.47 feet to the beginning of a non-tangent curve, concave to the West, and having a radius of 2832.98 feet, and from which point a radial line bears South 89° 40' 01" West;

Thence departing said East line of said Section 16, and continuing along said existing centerline of railroad track, Northerly and to the left along the arc of said curve, 252.02 feet through a central angle of 5° 05' 49" to the end of said curve, and to which point a radial line bears North 84° 34' 11" East;

Thence continuing along said existing centerline of railroad track, North 5° 19' 34" West, 560 feet more or less to a point on the ordinary high water mark of the lower Salt River and the terminus of said 100 foot wide strip of land.

EXCEPT the east 35 feet of said strip of land.

The limits of said strip of land shall be lengthened or shortened at the Point of Beginning and Termination, and at all angle points so as to provide the specified width of land throughout.

Containing 1.856 Acres, more or less.

OFFICE OF REAL ESTATE  
OMAHA, NEBRASKA  
WRITTEN BY: JCO  
November 6, 2003  
211408.leg

**EXHIBIT B**

**PURCHASE AND SALE AGREEMENT  
AND ESCROW INSTRUCTIONS**

**Between**

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation**

**SELLER**

**And**

**CITY OF TEMPE,  
a municipal corporation  
created under the provisions of Arizona Law**

**BUYER**

**“First Street Property”**

**DATED: [\_\_\_\_], 2003**

Escrow Holder: [\_\_\_\_\_]
[Address\_\_\_\_\_]

Escrow No. [\_\_\_\_\_]

Date of Opening of
Escrow: [\_\_\_\_\_]

PURCHASE AND SALE AGREEMENT
AND ESCROW INSTRUCTIONS

First Street Property

THIS PURCHASE AND SALE AGREEMENT AND ESCROW INSTRUCTIONS is made as of [\_\_\_\_\_], 20\_\_, ("Execution Date"), by and between UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Seller"), and CITY OF TEMPE, a municipal corporation created under the provisions of Arizona law ("Buyer").

ARTICLE I
PROPERTY

1.1 Property. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller that certain real property and improvements (except improvements not owned by Seller) thereon (the "Property") in Tempe, Maricopa County, Arizona, shown on the print attached hereto as Exhibit A and more particularly described in the form of Quit Claim Deed attached hereto as Exhibit B (the "Deed"), subject to the terms and conditions set forth herein, any and all applicable federal, state and local laws, orders, rules, regulations, any and all outstanding rights of record or open and obvious on the ground, and all matters set forth in the Deed. The Property shall be conveyed to Buyer subject to the fiber optic easement reservation set forth in Exhibit B.

ARTICLE II
PURCHASE PRICE

2.1 Purchase Price. The purchase price for the Property is Five Hundred Fifty Thousand Dollars (\$550,000) (the "Purchase Price"). Buyer has heretofore paid Seller the sum of Fifty Thousand Dollars (\$50,000) (the "Option Price") as consideration for the option granted under that certain Option to Purchase Real Property, dated as of [\_\_\_\_\_], 2003, by and between Buyer and Seller. At the Close of Escrow, the Option Price shall be credited against Buyer's obligation to pay the Purchase Price.

2.2 Payment of Purchase Price. At least one (1) business day prior to the Closing Date (as defined in Section 7.2.1), Buyer shall deliver a sum equal to the Purchase Price, reduced by the Option Price, together with Buyer's share of prorations and costs of Escrow as provided in Sections 7.6 through 7.8, such sum to be paid by cash deposit, cashier's or certified check drawn

upon a Arizona financial institution or confirmed wire transfer of U.S. funds for immediate credit.

### ARTICLE III "AS IS" SALE; RELEASE; INDEMNITY; INSPECTION

#### 3.1 As Is Sale; Release; Indemnity.

3.1.1 "As Is" Sale. Buyer and its representatives, prior to the Closing Date, will have been afforded the opportunity to make such inspections of the Property and matters related thereto as Buyer and its representatives desire, including, without limitation, governmental laws and regulations to which the Property is subject, and Buyer shall accept the Property upon the basis of its review and determination of the applicability and effect of such laws and regulations.

Buyer acknowledges and agrees that the Property is to be sold and conveyed to and accepted by Buyer in an "as is" condition with all faults, and that the Property has been used as a [\_\_\_\_\_]. Buyer further acknowledges that Buyer has received, reviewed and is knowledgeable of the matters described in **Exhibit C** attached hereto and made a part hereof (collectively, the "Property Materials"). Except as expressly set forth in this Agreement, Seller makes no representation or warranty as to the accuracy or completeness of said Property Materials. Seller does not make any representations or warranties of any kind whatsoever, either express or implied, with respect to the Property or any of such related matters; in particular, but without limitation, Seller makes no representations or warranties with respect to the use, condition, title, occupation or management of the Property, compliance with applicable statutes, laws, codes, ordinances, regulations or requirements relating to leasing, zoning, subdivision, planning, building, fire, safety, health or environmental matters, compliance with covenants, conditions and restrictions (whether or not of record), other local, municipal, regional, state or federal requirements, or other statutes, laws, codes, ordinances, regulations or requirements (collectively, "Condition of the Property"). Buyer acknowledges that it is entering into this Agreement on the basis of Buyer's own investigation of the physical and environmental conditions of the Property, including the subsurface conditions and Buyer assumes the risk that adverse physical and environmental conditions may not have been revealed by its investigation.

3.1.2 Release. Buyer, for itself, its successors and assigns, hereby waives, releases, remises, acquits and forever discharges Seller, Seller's employees, agents, or any other person acting on behalf of Seller, of and from any claims, actions, causes of action, demands, rights, damages, costs, expenses, penalties, fines or compensation whatsoever, direct or indirect, which Buyer now has or which Buyer may have in the future on account of or in any way arising out of or in connection with the Condition of the Property, including, without limitation, the known or unknown physical or environmental condition of the Property (including, without limitation, any contamination in, on, under or adjacent to the Property by any Hazardous Materials), or any federal, state or local law, ordinance, rule or regulation applicable thereto, including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act. As used in this Agreement, the term "Hazardous Materials" shall mean any hazardous or toxic substance, material or waste regulated by or subject to any local governmental authority, any agency of the State of Arizona, or any other agency of the United

States Government, including, without limitation, any material or substance which is (A) defined as a "hazardous waste", "extremely hazardous waste", "restricted hazardous waste", "hazardous substance", "hazardous material", "toxic material", "toxic substance", or words of similar import, under any federal, state or local governmental rule, regulation, ordinance, statute or act; (B) petroleum and any petroleum by-products; (C) asbestos; (D) urea-formaldehyde foam insulation; or (E) polychlorinated biphenol.

3.1.3 Indemnity. From and after Closing, Buyer shall, to the maximum extent permitted by law, indemnify, defend and save harmless Seller, its affiliates, their employees, agents, officers, successors and assigns, from and against any and all suits, actions, causes of action, legal or administrative proceedings, claims, demands, losses, costs, liabilities and expenses, including attorney's fees, in any way arising out of or connected with changes in the Condition of the Property post-Closing, including, without limitation, changes in the physical or environmental condition of the Property (including, without limitation, any new contamination in, on, under or adjacent to the Property by any Hazardous Materials), or any federal, state or local law, ordinance, rule or regulation applicable thereto, including, without limitation, the Toxic Substances Control Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act. The parties agree that the provisions of this Section 3.1.3 do not apply to any changes in the Condition of the Property post-Closing, if such changes are caused by Seller, its contractors or agents; provided, however, that any such changes caused by Seller, its contractors or agents, shall not affect the enforceability of the release set forth in Section 3.1.2 with respect to the Condition of the Property prior to Closing. The parties further agree that there shall be a rebuttable presumption that all Conditions of the Property have arisen post-Closing.

3.1.4 Survival. The provisions of this Section 3.1 shall survive the Closing and the delivery of the Deed.

### 3.2 Inspection.

3.2.1 Buyer and its representatives (including architects and engineers) shall have the right to enter upon and inspect the Property and conduct such boundary and topographic surveys, soil and engineering tests and environmental assessments with engineers or consultants licensed in the State of Arizona as Buyer may reasonably require; provided that such inspections and tests shall not materially damage the Property in any respect; provided, further, that such tests and inspections are conducted in accordance with standards customarily employed in the industry and in compliance with all governmental laws, rules and regulations; provided, still further, that Buyer notifies Seller in writing at least forty-eight (48) hours prior to the date that each and every of such testing or inspections are to be conducted on the Property and provides evidence, satisfactory to Seller, of the availability of adequate public liability and other insurance in excess of Buyer's self-insured retention of \$1 million, which insurance shall name Seller as an additional insured. Following each entry by Buyer on the Property, Buyer shall promptly restore the Property to its original condition as existed prior to any such inspections and/or tests. Buyer agrees to indemnify, hold harmless and defend Seller and Seller's affiliates ("Seller's affiliates" means any corporation which directly or indirectly controls or is controlled by or is under common control with Seller), its and their officers, agents, servants and employees against and

from any and all liability, loss, cost, damage or expense (including attorneys' fees) of whatsoever nature growing out of or in connection with personal injury to or death of persons whomsoever (including, without limitation, exposure to hazardous or toxic substances), or loss or destruction of or damage to property whatsoever (including, without limitation, contamination by hazardous or toxic substances and any required testing, removal or cleanup thereof), where such personal injury, death, loss, destruction or damage arises in any way in connection with or incident to the occupation or use of the Property pursuant to this Section 3.2.1 by, or the presence thereon of, Buyer, its officers, agents or employees and occurs from any such cause; provided, however, that this indemnity expressly excludes (i) any loss due to the diminution in value of the Property due to Buyer's discovery of any hazardous materials during its inspection of the Property, and (ii) any liability arising from Buyer's exposure of any existing hazardous materials on the Property to the extent such exposure occurs in the course of Buyer's inspection activities, except to the extent such liability is caused by the negligence or willful misconduct of Buyer. Notwithstanding the foregoing, nothing herein shall limit the Buyer's confidentiality obligations under Section 11.22, nor limit Seller's rights or remedies in the event such obligations are breached. If Buyer should discover any hydrocarbon substances or any other hazardous or toxic substances, asbestos or asbestos-bearing materials, waste or materials subject to legal requirements or corrective action, Buyer shall immediately notify Seller of the same. The indemnity obligations of Buyer under this Section shall survive any termination of this Agreement or the delivery of the Deed and the transfer of title. As a material consideration for Seller entering into this Agreement, Buyer covenants and agrees, upon request by Seller, to promptly deliver to Seller, without charge therefor, the results and copies of any and all surveys, reports, tests, studies or assessments made by or for Buyer, development approvals and correspondence with governmental entities with respect to the Property.

3.2.2 Buyer covenants and agrees not to permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Property for any work done or materials furnished thereon at the instance or request or on behalf of Buyer; and Buyer agrees to indemnify, hold harmless and defend Seller and Seller's affiliates, its and their officers, agents, servants and employees against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed or materials furnished prior to Closing.

## ARTICLE IV TITLE TO PROPERTY

4.1 The Deed. At the Closing (as defined in Section 7.2.1), Seller shall execute and deliver to Buyer the Deed to the Property in the form of **Exhibit B** attached hereto.

4.2 Leases and Licenses. At Closing, the leases, licenses, other agreements, and supplements thereto, in the records of Seller's Real Estate Department offices in Omaha, Nebraska, in effect for, or applicable to, the Property as of the date of this Agreement (which leases, licenses and other agreements are identified on **Exhibit "B"** to **Exhibit D**) (collectively, the "Leases and Licenses") will be assigned by Seller to, and assumed by, Buyer by duly executed Assignment and Assumption Agreement (the "Assignment") in the form attached hereto as **Exhibit D** and hereby made a part hereof.

## **ARTICLE V BUYER'S CONDITIONS TO CLOSING**

The following are conditions precedent to Buyer's obligation to purchase the Property. If any of the following conditions are not satisfied prior to Closing, Buyer shall not be obligated to purchase the Property.

### **5.1     Approval of Title.**

5.1.1 Buyer may, at its election and sole cost and expense, obtain from [ ] Title Company ("Title Company") a preliminary title report (the "Title Report") on the Property. If Buyer elects to obtain a Title Report, Buyer shall furnish to Seller a copy of same, together with copies of all documents referred to therein, when said Title Report is complete. On or before the end of the Feasibility Review Period ("Title Contingency Date"), Buyer shall deliver written notice to Seller ("Buyer's Title Notice") of all matters of title to the Property disapproved by Buyer ("Disapproved Items"). Buyer's failure to deliver Buyer's Title Notice by the Title Contingency Date shall be deemed to be Buyer's approval of the survey and all existing title matters. If Buyer timely notifies Seller of Disapproved Items and all or some of the Disapproved Items (except for those Disapproved Items, if any, which will be removed upon the Close of Escrow in accordance with the terms of this Agreement) are not cured or deleted as exceptions to title prior to the Closing Date, Buyer shall have the option of either waiving its disapproval of such Disapproved Items and proceeding to the Close of Escrow or terminating this Agreement, in which event the provisions of Section 5.1.3 shall govern. In the event Buyer elects to terminate this Agreement pursuant to this Section 5.1, Buyer shall notify Seller of its election by written notice no later than the Closing Date. Buyer's failure to timely deliver written notice to Seller of its election to terminate shall be deemed to be Buyer's election to proceed to the Close of Escrow and to waive its disapproval of such Disapproved Items. In no event shall Seller's failure to cure or delete as exceptions to the Title Policy any Disapproved Items be deemed to be a breach of this Agreement by Seller or entitle Buyer to any offset against the Purchase Price.

5.1.2 Title Company's willingness to issue a title insurance policy in the amount of the Purchase Price, subject only to such exceptions to title as have been approved by Buyer as provided in Section 5.1.1 above, shall be a condition precedent to Buyer's obligation to purchase the Property.

5.1.3 If this Agreement is terminated pursuant to this Section 5.1, each party shall pay an amount equal to one-half (1/2) of the "cost of cancellation of the Escrow" (as hereinafter defined), and neither party shall have any further rights or obligations under this Agreement (other than the Surviving Obligations as defined in Section 11.26 below). The term "cost of cancellation of the Escrow", as used herein shall be the costs accrued and charged by Escrow Holder and the Title Company for the cancellation of Escrow and the preparation of the Title Report, only.

5.2 Survey. Buyer may elect, at its sole cost and expense, to obtain a survey of the Property. If Buyer so elects, Buyer shall furnish a copy of same to Seller and Title Company when said survey is complete.

5.3 Feasibility Review. Buyer shall have approved, on or before ninety (90) days after the date first above written ("Feasibility Review Period"), the condition of the Property and the feasibility of Buyer's use thereof. Buyer's feasibility review shall pertain to Buyer's review of and satisfaction with Buyer's engineering studies, soils investigations, environmental assessments, surveys and physical inspection of the Property, and any other matter deemed by Buyer to be relevant to the acquisition of the Property. Buyer may elect, at any time prior to the expiration of the Feasibility Review Period, to terminate this Agreement as a result of Buyer's disapproval of any of the foregoing matters; provided, however, that if Buyer fails to notify Seller and Escrow Holder of Buyer's disapproval of the feasibility by written notice delivered to Seller no later than the date of expiration of the Feasibility Review Period, Buyer shall be deemed to have approved the feasibility and this condition shall be deemed satisfied. If this Agreement is terminated pursuant to the foregoing provisions of this Section 5.3, neither party shall have any further rights or obligations under this Agreement (except for the Surviving Obligations).

5.4 Compliance by Seller. Seller shall have complied with each and every condition and material covenant of this Agreement to be kept or complied with by Seller, and all representations and warranties made by Seller under this Agreement shall be true and correct as of the Closing Date.

5.5 STB Proceedings. No protest, petition to revoke, or similar objection to the transactions contemplated by this Agreement, nor any request for conditions, shall have been filed with the Surface Transportation Board ("STB").

5.6 No Litigation. No court or agency shall have issued an order restraining the consummation of the transactions contemplated by this Agreement, and no litigation affecting the Property shall have been commenced.

5.7 Freight Obligations. Buyer shall have satisfied itself that (a) Buyer shall not be deemed to have undertaken any obligation to provide freight rail services by reason of its acquisition of the Property, and (b) the provisions of the Railway Labor Act will not apply to Buyer solely by reason of its acquisition of the Property.

5.8 Funding Approval. It shall be a condition precedent to Closing that Buyer shall have obtained sufficient funding to close the transactions contemplated by this Agreement, and shall have received all necessary approvals from Buyer's funding agencies.

## **ARTICLE VI SELLER'S CONDITION TO CLOSING**

The following are conditions precedent to Seller's obligation to sell the Property:



6.1 Compliance by Buyer. It is a condition precedent to Seller's obligation to sell the Property that Buyer shall have complied with each and every condition and material covenant of this Agreement to be kept or complied with by Buyer.

## **ARTICLE VII OPENING AND CLOSING OF ESCROW**

7.1 Opening of Escrow and Escrow Instructions. Upon execution of this Agreement, the parties shall deposit three (3) executed counterparts of this Agreement with Escrow Holder and this instrument shall serve as the instructions to Escrow Holder for consummation of the purchase and sale contemplated hereby. Escrow Holder shall insert the date of the Opening of Escrow on the upper right hand corner of the first page of this Agreement on each of the three counterparts. The Opening of Escrow shall be the date upon which Escrow Holder has received executed counterparts of this Agreement from both Buyer and Seller. Escrow Holder shall deliver to both Buyer and Seller a set of counterparts of the Agreement executed by Buyer, Seller and Escrow Holder and shall retain a set in Escrow. Escrow Holder shall only be responsible for undertaking such matters in connection with the Closing as are specifically provided for herein or in any additional or supplementary escrow instructions delivered by the parties.

### 7.2 Closing.

7.2.1 Closing Date. The consummation of the transaction contemplated by this Agreement and recording of the Deed (the "Closing" or "Close of Escrow") shall occur and delivery of all items to be made at the Closing under the terms of this Agreement shall be made on or before one hundred twenty (120) days after the date first above written (the "Closing Date").

7.2.2 Preclosing Conditions. Provided that Escrow Holder can comply with these instructions, that Escrow Holder has received the deliveries described in Sections 7.3 and 7.4 below, that Escrow Holder has not received prior written notice from a party that any condition to such party's obligations has not been fulfilled, or that Buyer has elected to terminate its rights and obligations hereunder pursuant to Article V, or Seller has elected to terminate its rights and obligations hereunder pursuant to Article VI, then Escrow Holder is authorized and instructed to (a) record the Deed, (b) deliver the Purchase Price to Seller, less (i) the Option Price, which shall be credited to Buyer, and (ii) prorations and costs of Escrow in accordance with Section 7.6 below, (c) deliver conformed copies of the recorded Deed, and fully executed counterparts of the Assignment, to Buyer and Seller, and (d) deliver the closing statements to Buyer and Seller in accordance with Section 7.2.4 below.

7.2.3 Failure to Close. If the Closing does not occur on or before the Closing Date, then either party not then in default may elect to terminate this Agreement and cancel Escrow by giving written notice of such termination and cancellation to the other party and to Escrow Holder. In the event of such termination and cancellation, neither party shall have any further obligations hereunder (other than the Surviving Obligations), and all documents and other instruments shall be returned to the party depositing the same into Escrow. In the event

neither party is in default, the cost of cancellation of Escrow shall be shared equally between Buyer and Seller. In the event only one of the parties hereto is in default or if this Agreement expressly so provides, then such defaulting party shall pay for the entire cost of cancellation of Escrow. The termination of this Agreement and cancellation of Escrow, as provided herein, shall be without prejudice to whatever legal rights, as said rights may be limited by the terms contained in this Agreement, that Buyer or Seller may have against each other arising out of this Agreement and the Escrow. If neither party so elects to terminate this Agreement and cancel Escrow, Escrow Holder shall close the Escrow as soon as possible.

7.2.4 Notification; Closing Statements. If Escrow Holder cannot comply with the instructions herein and to be provided, Escrow Holder is not authorized to cause the recording of the Deed or close this Escrow. If Escrow Holder is unable to cause the recording of the Deed, Escrow Holder shall notify *[Insert name and telephone number of UP Representative]* and *[Insert name and telephone number of City Representative]*, without delay. If Escrow Holder is able to comply with the instructions herein and to be provided, immediately after the Closing, Escrow Holder shall deliver to Seller at the addresses provided in Section 11.9 a true, correct and complete copy of the Seller's closing statement, in the form customarily prepared by Escrow Holder and shall deliver to Buyer at the address provided in Section 11.9 a true, correct and complete copy of Buyer's closing statement, in the form customarily prepared by Escrow Holder.

7.3 Deliveries by Seller. Not later than one (1) business day prior to the Closing Date, Seller shall deposit with Escrow Holder the following items:

7.3.1 Deed. The Deed in the form of **Exhibit B**, duly executed and acknowledged by Seller.

7.3.2 Assignment. The Assignment in the form of **Exhibit D** duly executed by Seller.

7.3.3 Intentionally Omitted.

7.3.4 Intentionally Omitted.

7.3.5 Intentionally Omitted.

7.3.6 Non-Foreign Status Certificate. A Non-Foreign Status Certificate pursuant to Internal Revenue Code Section 1445 duly executed by Seller in the form of **Exhibit E**.

7.3.7 Other Documents. Any other documents, instruments, data, records, correspondence or agreements called for hereunder which have not previously been delivered.

7.4 Deliveries by Buyer. Not later than one (1) business day prior to the Closing Date (or such other time specified below), Buyer shall deposit with Escrow Holder the following items:

7.4.1 Purchase Price. A sum in an amount equal to the Purchase Price, reduced by the Option Price, plus Buyer's share of the prorations and costs of Escrow which are required pursuant to this Article to close Escrow.

7.4.2 Assignment. The Assignment in the form of **Exhibit D** duly executed by Buyer.

7.4.3 Intentionally Omitted.

7.4.4 Intentionally Omitted.

7.4.5 Intentionally Omitted.

7.4.6 Other Documents. Any other documents, instruments, data, records, correspondence or agreements called for hereunder which have not been previously delivered.

7.5 Other Instruments. Seller and Buyer shall each deposit such other instruments and take such other actions as are reasonably required by Escrow Holder or otherwise required to close the Escrow and consummate the purchase of the Property in accordance with the terms hereof.

## 7.6 Prorations.

7.6.1 All expenses of the Property, including, without limitation, real property taxes, special taxes, assessments and utility fees and/or deposits, and rentals under any leases shall be prorated and apportioned between Buyer and Seller as of 12:01 a.m. on the Closing Date, so that Seller bears all expenses with respect to the Property through and including the date immediately preceding the Closing Date. Seller and Buyer hereby agree that any of the aforesaid prorations which cannot be calculated accurately as of the Closing Date shall be prorated on the basis of the parties' reasonable estimates, and shall be recomputed between Seller and Buyer when actual tax statements for the year of Closing are received, and either party owing the other party a sum of money based on such subsequent proration adjustment shall promptly pay said sum to the other party, and, if payment is not made within ten (10) days after delivery of a bill therefor, shall pay interest thereon, at the lesser of the rate of ten percent (10%) per annum or the highest rate permitted by law, from the Closing Date to the date of payment. Seller shall be responsible for such taxes or assessments (including, without limitation, possessory interest taxes, if any) as may separately be levied on any rights retained by Seller under Section 1.1. The provisions of this Section 7.6.1 shall survive the Closing and the delivery of the Deed.

7.6.2 All rents, common area maintenance charges, other amounts paid by a tenant of the Property, and other income from the Property attributable to periods prior to the Closing shall be retained by Seller, and all such income attributable to and collected for periods subsequent to the Closing shall be credited to Buyer. Buyer shall have no obligation to collect any rents or other charges due but uncollected prior to such Closing. All tenant security deposits, if any, shall be transferred to Buyer upon the Closing, and Buyer shall execute a

document acknowledging receipt of such deposits and agreeing to hold them in accordance with the terms in the applicable Leases.

7.7 Special Taxes, Bonds or Assessments. If, at the time of Closing, any portion of the Property is affected by an assessment or other charge, whether for taxes or bonds, or interest thereon, which is or may become payable in installments, and an installment payment of such assessment is then a lien, then such installment shall be prorated as of 12:01 a.m. on the Closing Date. All installments not then yet due whether or not the same have been prepaid shall not be prorated and Buyer shall assume such bonds or assessments. Any prepaid assessments made in advance of its due date shall be credited to Seller. In addition, Buyer shall assume any and all future bonds, assessments, special taxes, fees or charges applicable to the Property for liabilities now or hereafter imposed by any governmental authority (collectively referred to as "Governmental Requirements") including, without limitation, any such Governmental Requirements imposed by the City of Tempe, and those for (i) local assessment or improvement districts, (ii) any special tax assessments, (iii) traffic mitigation improvements (iv) park and recreation fees, and/or (v) any other public facility infrastructure or traffic mitigation required or imposed by the City of Tempe. Buyer shall assume all such bonds or future assessments without offset or adjustment.

7.8 Costs and Expenses. The costs and expenses of Escrow upon Close of Escrow shall be allocated as follows: Buyer shall pay the premium for any title insurance desired by Buyer and all other standard costs and charges of the Escrow.

7.9 Disbursement of Funds. On the Close of Escrow, Escrow Holder shall disburse the Purchase Price less (a) the Option Price, which shall be credited to Buyer, and (b) Seller's share of prorations as determined pursuant to Section 7.6 in immediately available funds, and, unless otherwise instructed by Seller, Escrow Holder shall cause such funds to be sent by wire transfer as follows:

US Bank  
Omaha, Nebraska 68102  
ABA Routing #104000029  
For Credit Union Pacific Railroad Company  
Account No. 148744571164

Such funds are to be wired as of 11:00 a.m. P.S.T. on such date in order that such funds may be received by Seller on the Close of Escrow; provided, however, that if such funds cannot be wired to Seller on the Close of Escrow, Escrow Holder shall, unless otherwise directed in writing by Seller, invest the funds overnight in an interest-bearing account.

7.10 Delivery of Documents. Upon the Close of Escrow all instruments and documents shall be delivered forthwith to each party's attorney specified in Section 11.9, and if no attorney is specified, then to such party directly. Escrow Holder shall forthwith deliver to the party entitled thereto the recorded originals of such instruments or documents upon Escrow Holder's receipt of the same.

7.11 Supplemental Taxes. Seller and Buyer acknowledge that the Property may be subject to supplemental taxes due as a result of change of ownership taking place through this Escrow. Any necessary adjustment due either party on receipt of a supplemental tax bill will be made by the parties outside of this Escrow and Escrow Holder is released of any liability in connection with same.

## **ARTICLE VIII REPRESENTATIONS, WARRANTIES AND COVENANTS**

8.1 Representations and Warranties of Seller. Seller hereby represents and warrants to Buyer as of the date of this Agreement, as follows:

8.1.1 Organization. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and qualified to do business in Arizona.

8.1.2 Authority. Seller has full statutory power and authority to enter into this Agreement and, subject to necessary regulatory authority, to carry out the obligations of Seller under this Agreement.

8.1.3 Due Authorization. This Agreement has been duly authorized, executed and delivered by Seller. Neither the execution and delivery of this Agreement by Seller, the consummation by Seller of the transaction contemplated hereby, nor compliance or performance by Seller with any of the provisions hereof, does or will violate any judgment, order, law or regulation applicable to Seller or any provisions of Seller's certificate of incorporation or by-laws or result in any material breach of, or constitute a material default under, or result in the creation of, any material liens, charge, security interest or other encumbrance upon the Property (other than created by this transaction) pursuant to any note, bond, indenture, mortgage, deed of trust, bank loan or credit agreement or other instrument to which Seller is a party or by which any of the Property is bound.

8.1.4 Condemnation or Violations of Law. To the best of Seller's knowledge, except (a) as set forth in the Property Materials, (b) for any matter related to Buyer, or (c) as previously disclosed to Buyer in writing, Seller has not received any written notice of any existing or threatened condemnation or material violation of law.

8.1.5 Hazardous Materials. To the best of its knowledge, except as disclosed in the Property Materials, Seller has no knowledge of (a) any material release of a Hazardous Material, as defined in Section 3.1. heretofore, on or beneath the Property; (b) any receipt by Seller of any written governmental notice that any of the Property is in violation, in any material respect, under any law, or other governmental or judicial requirement, relating to Hazardous Materials; (c) any existing, pending or threatened investigation by any governmental authority under or in connection with any law, or other governmental or judicial requirement, relating to Hazardous Materials; or (d) any other environmental assessment reports on the Property in the records of Seller's Real Estate Department in Omaha, Nebraska or Seller's Environmental Management Group in Omaha, Nebraska.

8.1.6 Litigation; Judgments. To the best of its knowledge, except as disclosed in the Property Materials, Seller has no knowledge of any pending litigation, administrative action, governmental investigation, examination, claim or demand (including, but not limited to, environmental investigations, examinations, claims and demands) whatsoever, nor any judgments, orders or decrees entered in any lawsuits or proceedings, affecting the Property.

8.1.7 Senior Rights. Seller has no knowledge that any tenant or other third party has any agreement or right granted by Seller to purchase all or any part of the Property that is senior to Buyer's rights hereunder.

8.1.8 Seller's Pre-Closing Deliveries. Seller represents that, to the best of its knowledge, it has delivered to Buyer true and correct copies of any and all valuation maps, Leases and Licenses, and environmental studies and reports in effect for, or applicable to, the Property as of the date of this Agreement to the extent the same are in the records of Seller's Real Estate Department offices in Omaha, Nebraska and Seller's Environmental Management Group offices in Omaha, Nebraska. In the event Seller discovers any additional Leases or Licenses, valuation maps or environmental studies or reports prior to the Closing, Seller shall promptly deliver the same to Buyer. Seller has no knowledge of (i) any tenancy or other agreements that materially affect Seller's current use of the Property, other than the Leases and Licenses; or (ii) any material defaults under any of the Leases and Licenses by any party thereunder. To Seller's knowledge, Seller has no unfulfilled financial obligations to tenants or other parties under any of the Leases or Licenses.

8.1.9 National Register of Historic Places To Seller's knowledge, none of the Property improvements owned by Seller are listed on the National Register of Historic Places, or any comparable Arizona list.

8.1.10 Limitation As used in this Agreement, the term "current, actual knowledge," or "to the best of its knowledge," or "Seller's knowledge" means and refers only to the current, actual (not constructive) knowledge, without any duty of investigation or inquiry, of Brian Morrissey, General Director Real Estate, Norman D. Siler, Manager-Environmental Site Remediation, Tony Love, General Manager Real Estate, Mark Schulte, Senior Real Estate Manager, Gregg Larsen, Manager Real Estate, Jerry Wilmoth, General Manager, Network Infrastructure, Jeff Asay, Assistant General Solicitor, and Gerry Sullivan, General Attorney (collectively, "Seller's Representatives"). ***[If the above individuals are not employed by Union Pacific when the Option is exercised, or if they are no longer likely to have knowledge of the truth or falsity of the foregoing representations due to a change in position, insert names of Union Pacific representatives in corresponding positions that are likely to have such knowledge when the Option is exercised.]***

8.1.11 Seller acknowledges and agrees that, other than the compensation paid to Seller hereunder, it is not entitled to any further assistance under the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601, *et seq.*), the State of Arizona's relocation laws (A.R.S. §11-961, *et. seq.*), or any other federal, state or local

law, ordinance or regulation requiring the provision of relocation assistance to persons displaced by action of public agencies by reason of the transactions contemplated by this Agreement.

8.1.12 Seller shall cooperate with Buyer's efforts to remove any encroachments after the Closing, which cooperation shall consist of making Seller's records reasonably available for Buyer's inspection and making Seller's employees reasonably available, at Buyer's sole cost and expense, to testify.

8.1.13 The foregoing representations and warranties of Seller shall survive the Closing and the delivery of the Deed for a period of five (5) years and shall then expire and terminate.

8.3 Representations, Warranties and Covenants of Buyer. Buyer hereby represents, warrants and covenants to Seller as of the date of this Agreement and as of the Closing Date, as follows:

8.3.1 Organization. Buyer is a municipal corporation, duly organized, validly existing and in good standing under the laws of the State of Arizona.

8.3.2 Due Authorization. This Agreement has been duly authorized, executed and delivered by Buyer. Neither the execution and delivery of this Agreement by Buyer, the consummation by Buyer of the transaction contemplated hereby, nor compliance or performance by Buyer with any of the provisions hereof does or will violate any judgment, order, law or regulation applicable to Buyer.

8.3.3 Authority. Buyer has full statutory power and authority to enter into this Agreement and, subject to necessary regulatory authority, to carry out the obligations of Buyer under this Agreement.

8.3.4 Threat of Eminent Domain. Buyer acknowledges and represents that it has the power of eminent domain. Buyer represents that it will institute eminent domain proceedings in the event that Seller does not sell the Property pursuant to this Agreement. Buyer further acknowledges that Seller intends to treat any gain or loss realized from the sale of the Property as sold under imminent threat of condemnation pursuant to Section 1033 of the federal Internal Revenue Code of 1986.

8.4 Mutual Representations and Covenants, Brokers and Finders. No broker's fee, finder's fee, commission or similar compensation shall be paid to principals of Buyer or Seller in connection with this Agreement. In the event of a claim for broker's fee, finder's fee, commission or other similar compensation in connection herewith other than as set forth above, Buyer, if such claim is based upon any agreement alleged to have been made by Buyer, hereby agrees to indemnify and hold Seller harmless against any and all liability, loss, cost, damage or expense (including reasonable attorneys' fees and costs) which Seller may sustain or incur by reason of such claim; and Seller, if such claim is based upon any agreement alleged to have been made by Seller, hereby agrees to indemnify and hold Buyer harmless against any and all liability, loss, cost, damage or expense (including reasonable attorneys' fees and costs) which

Buyer may sustain or incur by reason of such claim. The provisions of this Section shall survive the Close of Escrow or termination of this Agreement.

## **ARTICLE IX CONDEMNATION AND RISK OF LOSS**

9.1 If, prior to the Close of Escrow, a governmental agency commences or imminently threatens in writing to commence any eminent domain proceedings to take any material portion of the Property, Buyer shall have the unilateral right, exercisable by giving notice of such decision to Seller within ten (10) days after receiving written notice of such actual or threatened condemnation proceedings, to terminate this Agreement, in which case Buyer and Seller shall each pay one-half (1/2) of the cost of cancellation of Escrow, and neither party shall have any further rights or obligations under this Agreement (other than the Surviving Obligations). If Buyer does not elect to terminate pursuant to this Section 9.1, the net proceeds of condemnation awards payable to Seller by reason of such condemnation shall be paid or assigned to Buyer upon the Close of Escrow.

9.2 If, prior to the Close of Escrow, the improvements on the Property are destroyed or materially damaged, Buyer shall have the unilateral right, exercisable by giving notice of such decision to Seller within ten (10) days after receiving written notice of such destruction or damage, to terminate this Agreement, in which case Buyer and Seller shall pay one-half (1/2) of the cost of cancellation of Escrow, and neither party shall have any further rights or obligations under this Agreement (other than the Surviving Obligations). If Buyer does not elect to terminate pursuant to this Section 9.2, the net insurance proceeds, if any, payable to Seller by reason of such destruction or damage shall be paid or assigned to Buyer upon the Close of Escrow.

## **ARTICLE X POSSESSION**

Possession of the Property shall be delivered to Buyer on the Close of Escrow, subject to any Leases and Licenses identified in this Agreement.

## **ARTICLE XI MISCELLANEOUS**

11.1 Agreement Expenses. The parties agree to bear their respective expenses, incurred or to be incurred in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.

11.2 Satisfaction or Waiver of Contingencies. The consummation of the Closing shall be conclusive evidence that the contingencies and conditions to Closing have been fully satisfied or waived.

11.3 Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors, heirs, administrators and assigns,



except that Buyer's interest under this Agreement may not be assigned, encumbered or otherwise transferred, whether voluntarily, involuntarily, by operation of law or otherwise, without Seller's prior written approval, which approval shall not be unreasonably withheld or delayed. Any assignment, encumbrance or other transfer in violation of the foregoing shall be void and Buyer shall be deemed in default hereunder; provided, however, that nothing in this Agreement shall be construed to prohibit Buyer's conveyance of all or any portion of the Property, or assignment of its rights as owner of the Property, following the Close of Escrow.

11.4 Parties in Interest. Except as expressly provided in this Agreement, nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it and their respective successors and assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision give any third persons any right to subrogation or action over against any party to this Agreement.

11.5 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes all prior or contemporaneous oral or written agreements, representations, statements, documents, or understandings of the parties.

11.6 Amendment. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by the party to be bound.

11.7 Waiver. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

11.8 Timeliness. Seller and Buyer hereby acknowledge and agree that time is strictly of the essence with respect to each and every term, condition, obligation and provision hereof and that failure to timely perform any of the terms, conditions, obligations or provisions hereof by either party shall constitute a material breach of and a non-curable (but waivable) default under this Agreement by the party so failing to perform.

11.9 Notices. Any notice or other communication required or permitted to be given under this Agreement ("Notices") shall be in writing and shall be (i) personally delivered; (ii) delivered by a reputable overnight courier; or (iii) delivered by certified mail, return receipt requested and deposited in the U.S. Mail, postage prepaid. Telecopy notices shall be deemed valid only to the extent they are (a) actually received by the individual to whom addressed and (b) followed by delivery of actual notice in the manner described above within three (3) business days thereafter. Notices shall be deemed received at the earlier of actual receipt or (i) one (1) business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (ii) three (3) business days following deposit in the U.S. Mail, as evidenced by a return receipt. Notices shall be directed to the parties at their respective addresses shown below, or such other address as either party may, from time to time, specify in writing to the other in the manner

described above: *[Modify the following names and addresses as appropriate when the Option is exercised.]*

If to Seller: Gregg A. Larsen  
UNION PACIFIC RAILROAD COMPANY  
1800 Farnam Street  
Omaha, Nebraska 68179  
Telephone: (402) 997-3552  
Facsimile: (402) 997-3601

With copy to: UNION PACIFIC RAILROAD COMPANY  
ATTN: Gerard Sullivan  
1416 Dodge Street, Room 830  
Omaha, Nebraska 68179  
Telephone: (402) 271-4468  
Facsimile: (402) 271-7107 or 271-5610

If to Buyer: Marlene A. Pontrelli  
Tempe City Attorney  
P.O. Box 5002  
Tempe, AZ 85280  
Telephone: (480) 350-8227  
Facsimile: (480) 350-8645

With copy to: MILLER, OWEN & TROST  
ATTN: Kirk Trost  
428 "J" Street, Suite 400  
Sacramento, California 95814-2394  
Telephone: (916) 447-7933  
Facsimile: (916) 447-5195

11.10 Governing Law and Venue. This Agreement shall be construed in accordance with, and governed by, the laws of the State of Arizona, and any action or proceeding, including arbitration, brought by any party in which this Agreement is subject, shall be brought in the county in which the Property is located.

11.11 Effect of Headings. The headings of the paragraphs of this Agreement are included for purposes of convenience only, and shall not affect the construction or interpretation of any of its provisions.

11.12 Intentionally Omitted.

11.13 Counterparts; Facsimile Signatures. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signatures delivered by one party to the other by facsimile shall be deemed original signatures and enforced accordingly.

11.14 Number and Gender. When required by the context of this Agreement, each number (singular and plural) shall include all numbers, and each gender shall include all genders.

11.15 Joint and Several Liability. In the event either party hereto now or hereafter shall consist of more than one person, firm, or corporation, then and in such event, all such persons, firms, or corporations shall be jointly and severally liable as parties under this Agreement.

11.16 Recording. The parties shall record this Agreement or a memorandum thereof.

11.17 Further Assurances. Each party to this Agreement agrees to execute, acknowledge, and deliver such further instruments as may be necessary or desirable to accomplish the intent and purpose of this Agreement, provided that the party requesting such further action shall bear all costs and expenses related thereto.

11.18 Advice of Professionals. Each party has had the opportunity to be advised by legal counsel and other professionals in connection with this Agreement, and each party has obtained such advice as each party deems appropriate.

11.19 Negotiated Terms. The parties agree that the terms and conditions of this Agreement are the result of negotiations between the parties and that this Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professionals participated in the preparation of this Agreement.

11.20 Recitals and Exhibits. The recitals and contents of all Exhibits to this Agreement are incorporated by reference and constitute a material part of this Agreement.

11.21 Professional Fees and Costs. If any legal or equitable action, arbitration, or other proceeding, whether on the merits, application, or motion, are brought or undertaken to enforce this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, then the successful or prevailing party or parties in such undertaking shall be entitled to recover reasonable attorney's and other professional fees, expert witness fees, court costs and other expenses incurred in such action, proceeding, or discussions, in addition to any other relief to which such party may be entitled. The parties intend this provision to be given the most liberal construction possible and to apply to any circumstances in which such party reasonably incurs expenses. The provisions of this Section shall survive the Close of Escrow or the termination of this Agreement.

11.22 Confidentiality. All information, studies and reports relating to the environmental condition of the Property obtained by Buyer, either by the observations and examinations of its agents and representatives or as disclosed to it by Seller, shall remain confidential and Buyer shall not disclose any such matters to any person or governmental agency except as required by law. If the transaction contemplated herein fails to close for any reason, Buyer shall deliver and return to Seller, at no cost to Seller, all such information, reports and studies, and Buyer shall make no further distributions or disclosures of any such information, reports and studies. The provisions of this Section shall survive the termination of this Agreement.

11.23 Severability. Any provision of this Agreement that is determined by a court of competent jurisdiction to be invalid or unenforceable shall be invalid or unenforceable only to the extent of such determination, which shall not invalidate or otherwise render ineffective any other provision of this Agreement.

11.24 Merger. Except as otherwise expressly provided herein, the covenants, representations and warranties of Buyer and Seller herein shall merge into the Deed to be delivered by Seller to Buyer at Closing and shall not survive the Closing of Escrow.

11.25 Survival. Buyer and Seller acknowledge and agree that in the event of the termination howsoever of this Agreement, the obligations of and indemnity by Buyer in Section 3.2, the confidentiality provisions of Section 11.22, and the provisions of Sections 3.1, 8.4 and 11.21 hereof (hereafter "Surviving Obligations") shall not be limited, impaired or otherwise affected by any termination of this Agreement as a result of such termination.

11.26 Cancellation. This Agreement is subject to cancellation by Buyer pursuant to the provisions of A.R.S. §38.511.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first above written.

**SELLER:**

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation**

By: \_\_\_\_\_  
\_\_\_\_\_,  
General Manager – Real Estate

**BUYER:**

**CITY OF TEMPE, a municipal corporation  
created under the provisions of Arizona law**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO LEGAL FORM

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE UNDERSIGNED ESCROW HOLDER ACKNOWLEDGES ITS RECEIPT  
OF THREE (3) EXECUTED COPIES OF THIS AGREEMENT AND AGREES TO ACT IN  
ACCORDANCE THEREWITH.

**ESCROW HOLDER:**

[\_\_\_\_\_]

By: \_\_\_\_\_  
\_\_\_\_\_, Escrow Officer

## **EXHIBIT "A" TO EXHIBIT "B"**

### **Property Description**

A portion of the East half of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at the Southeast corner of said Section 16;

Thence along the East line of said Section 16, North 00° 17' 10" West, 2230.81 feet to a point on the Easterly prolongation of the South line of Lot 31E of "State Plat 12 Amended," a subdivision recorded in Book 69 of Maps, Page 38, Maricopa County Recorder, said point also being on the existing centerline of railroad track, and also being the Point of Beginning of a strip of land 100 feet in width, the Easterly line of which is described herein;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 17' 10" West, 409.00 feet to the East quarter corner of said Section 16;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 13' 45" West, 334.47 feet to the beginning of a non-tangent curve, concave to the West, and having a radius of 2832.98 feet, and from which point a radial line bears South 89° 40' 01" West;

Thence departing said East line of said Section 16, and continuing along said existing centerline of railroad track, Northerly and to the left along the arc of said curve, 252.02 feet through a central angle of 5° 05' 49" to the end of said curve, and to which point a radial line bears North 84° 34' 11" East;

Thence continuing along said existing centerline of railroad track, North 5° 19' 34" West, 560 feet more or less to a point on the ordinary high water mark of the lower Salt River and the terminus of said 100 foot wide strip of land.

EXCEPT the east 35 feet of said strip of land.

The limits of said strip of land shall be lengthened or shortened at the Point of Beginning and Termination, and at all angle points so as to provide the specified width of land throughout.

Containing 1.856 Acres, more or less.

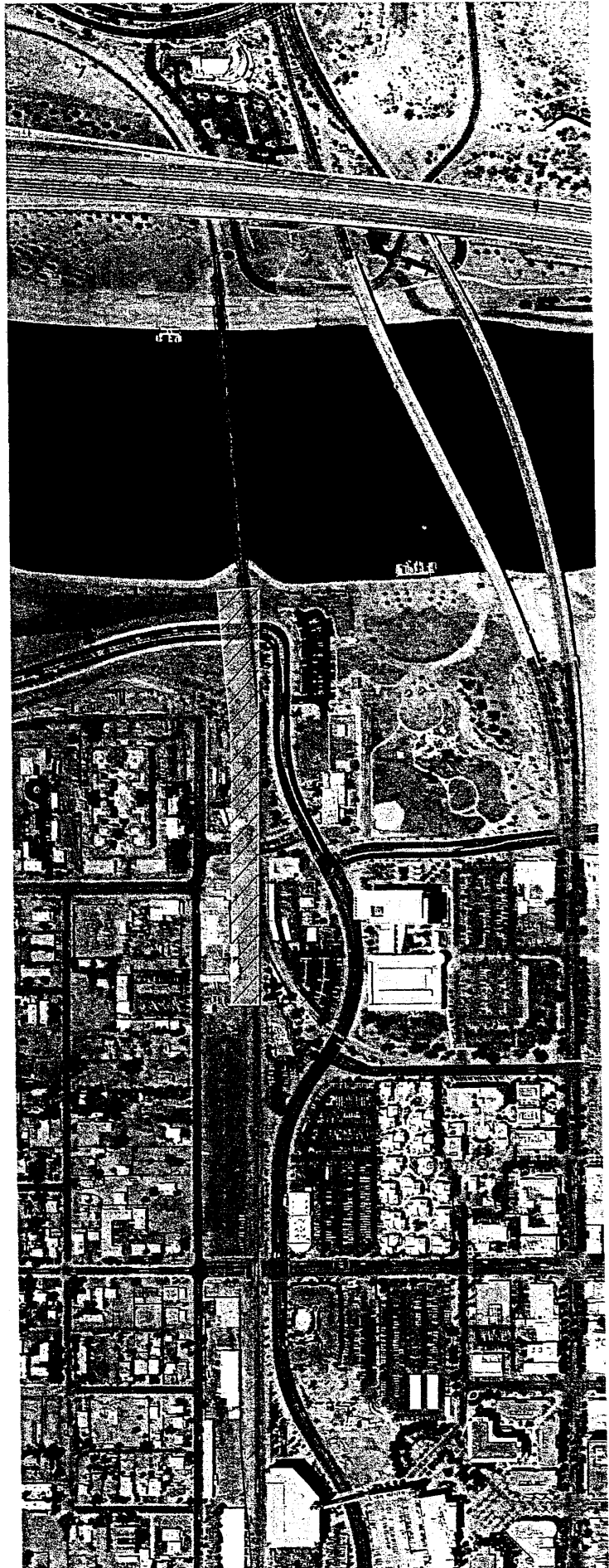
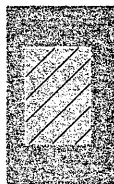
OFFICE OF REAL ESTATE  
OMAHA, NEBRASKA  
WRITTEN BY: JCO  
November 6, 2003  
211408.leg

**EXHIBIT “A” TO EXHIBIT B**

**PRINT OF PROPERTY**



FIRST ST.  
OPTION



**EXHIBIT "B" TO EXHIBIT B**

**QUIT CLAIM DEED  
(First Street Property)**

Send Tax Statements to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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(Space above line for Recorder's use only)

APN \_\_\_\_\_ This instrument is exempt from Affidavit and Filing Fees (ARS §42-1614A2)

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Grantor") (formerly known as Southern Pacific Transportation Company, a Delaware corporation), in consideration of the sum of Ten Dollars (\$10.00), and other valuable consideration to it duly paid, the receipt whereof is hereby acknowledged, does hereby REMISE, RELEASE and forever QUIT CLAIM to the CITY OF TEMPE, a municipal corporation created under the provisions of Arizona law ("Grantee"), whose address is P.O. Box 5002, Tempe, Arizona 85280 and unto its successors and assigns forever, all of Grantor's right, title, interest, estate, claim and demand, both at law and in equity (including without limitation all right, title, interest, estate, claim and demand, which Grantor has by virtue of the General Railroad Right-of-Way Act of March 3, 1875, ch.152, 18 U.S. Stat. 482, 43 U.S.C., Sections 934-939), of, in, and to the real estate (hereinafter the "Property") situated in the in the City of Tempe, County of Maricopa, State of Arizona, as more particularly described in **Exhibit A**, hereto attached and hereby made a part hereof.

The Property is being conveyed subject to the following reservations, covenants and restrictions:

(1) The terms and conditions of the General Railroad Right-of-Way Act of March 3, 1875, ch.152, 18 U.S. Stat. 482, 43 U.S.C., Sections 934-939.

(2) EXCEPTING exclusive PERPETUAL EASEMENT five feet (5') in width measured from the centerline of any existing fiber optic improvements (i.e., two and one-half feet (2.5') on either side of the centerline), in, on, over, under and across the Property ("Fiber Optics Easement Property"), in which areas Grantor, Williams Communications LLC ("Williams Communications"), its successors or assigns, shall have the right to own, reconstruct, maintain, operate, use and/or remove existing and/or future communication systems, lines and facilities,

including, but not limited to, all existing fiber optic lines and related equipment (the "Fiber Optics Improvements"). Grantor does further reserve unto itself, its successors and assigns, a limited right-of-way and right of access to the Fiber Optics Easement Property over and across the Property, for the purposes of the use, enjoyment, maintenance, operation and access to the Fiber Optics Easement Property. All future Fiber Optics Improvements placed on the Fiber Optics Easement Property shall conform to any and all limitations on such improvements presently set forth in that certain Fiber Optic Agreement between Williams Communications, Inc. and Grantor dated March 27, 1998 (the "Williams Fiber Optics Agreement"). All Fiber Optics Improvements presently existing on or hereafter constructed on the Fiber Optics Easement Property shall remain the personal property of Grantor or the party owning/controlling/installing same.

(a) Grantor shall be entitled to all revenues derived from its agreements with Williams Communications, its successors and assigns, affecting the Fiber Optics Easement Property.

(b) No permanent building, structure or fence and no material or obstruction of any kind or character shall be stored or maintained on said Fiber Optics Easement Property which would obstruct or interfere with the easement without the prior written consent of the easement owner. Notwithstanding the foregoing, Grantee shall have the right to place or make the following improvements on or to the Fiber Optics Easement Property, without first obtaining Grantor's approval: fences, movable walls, and other movable barriers; security lighting; asphalt, concrete, or other pavement; and landscaping.

(c) Notwithstanding any other provision contained herein, the quit claim of the Property is subject to, and the Fiber Optics Easement reserved herein shall allow Grantor to honor its grant and fulfill its other obligations as grantor under the Williams Fiber Optics Agreement.

(d) If Grantee requests in writing that some or all of the Fiber Optics Improvements be relocated to Grantor's adjacent railroad right-of-way, Grantor shall, to the extent feasible, taking into consideration Grantor's operational needs and concerns on the adjacent railroad right-of-way, reasonably cooperate with Grantee to cause Williams Communications, its successors or assigns, to so relocate the Fiber Optics Improvements so that the entire width of the fiber optics easement is located on the adjacent railroad right-of-way. Any and all costs and expenses connected with any such relocation made at Grantee's written request shall be borne by Grantee.

TOGETHER with all and singular the hereditaments and appurtenances thereunto belonging; TO HAVE AND TO HOLD, subject to the aforesaid provisions, the Property unto the said Grantee and unto its successors and assigns.

Grantor, Federal ID No. 94-6001323, is not a foreign corporation and withholding of Federal Income Tax from the amount realized will not be made by Grantee. A Certification

prepared in conformance with IRS regulations under Section 1445 of the Internal Revenue Code is attached as **Exhibit B**.

IN WITNESS WHEREOF, the Grantor has caused this deed to be duly executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 2003.

Attest: UNION PACIFIC RAILROAD COMPANY,

\_\_\_\_\_  
Assistant Secretary

By \_\_\_\_\_  
Title:

The undersigned Grantee accepts this Deed subject to the terms, reservations, conditions and covenants set forth heretofore.

GRANTEE  
CITY OF TEMPE

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT "B" TO EXHIBIT "B"**

**CERTIFICATION OF NON-FOREIGN STATUS**

Under Section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust, or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. To inform the transferee, CITY OF TEMPE, that no withholding is required with respect to the transfer of a U.S. real property interest by UNION PACIFIC RAILROAD COMPANY, the undersigned hereby certifies the following on behalf of UNION PACIFIC RAILROAD COMPANY:

1. UNION PACIFIC RAILROAD COMPANY is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. UNION PACIFIC RAILROAD COMPANY'S U.S. employer identification number is 94-6001323; and
3. UNION PACIFIC RAILROAD COMPANY'S office address is 1416 Dodge Street, Omaha, Nebraska 68179, and place of incorporation is Delaware.

UNION PACIFIC RAILROAD COMPANY agrees to inform the transferee if it becomes a foreign person at any time during the three year period immediately following the date of this notice.

UNION PACIFIC RAILROAD COMPANY understands that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this Certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of UNION PACIFIC RAILROAD COMPANY.

UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**EXHIBIT "C" TO EXHIBIT B**

**PROPERTY MATERIALS**

[INTENTIONALLY LEFT BLANK – WILL SUPPLY AT A LATER DATE]

## **EXHIBIT "D" TO EXHIBIT B**

### **ASSIGNMENT AND ASSUMPTION AGREEMENT**

FOR VALUE RECEIVED, UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Assignor"), acting by and through its duly authorized officers, has ASSIGNED AND TRANSFERRED, and by these presents does ASSIGN AND TRANSFER unto the CITY OF TEMPE, a municipal corporation created under the provisions of Arizona law ("Assignee"), all of Assignor's right, title and interest in and to the tenant leases and licenses ("Leases and Licenses") now or hereafter affecting the real property (the "Property") described on **Exhibit A**, which Leases and Licenses, and all amendments thereto, are described on **Exhibit B**, together with all security deposits and other deposits held by Assignor under the terms of said Leases and Licenses.

TO HAVE AND TO HOLD the Leases and Licenses unto Assignee, its successors and assigns. This Assignment is made and accepted without recourse against Assignor as to the performance by any party under such Leases and Licenses.

Assignee agrees to perform all of the obligations of Assignor pursuant to the Leases and Licenses accruing after the date hereof.

This Assignment and Assumption Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

This Assignment and Assumption Agreement shall be construed in accordance with, and governed by, the laws of the State of Arizona, and any action or proceeding, including arbitration, brought by any party in which this Agreement is subject, shall be brought in the county in which the Property is located.

All exhibits attached to this Agreement are incorporated herein for all purposes.

This Assignment and Assumption Agreement shall inure to and be binding upon the parties, their successors and assigns.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation

By: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_,

a \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_



## **EXHIBIT "A" TO EXHIBIT "D"**

### **Legal Description of Property**

A portion of the East half of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at the Southeast corner of said Section 16;

Thence along the East line of said Section 16, North 00° 17' 10" West, 2230.81 feet to a point on the Easterly prolongation of the South line of Lot 31E of "State Plat 12 Amended," a subdivision recorded in Book 69 of Maps, Page 38, Maricopa County Recorder, said point also being on the existing centerline of railroad track, and also being the Point of Beginning of a strip of land 100 feet in width, the Easterly line of which is described herein;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 17' 10" West, 409.00 feet to the East quarter corner of said Section 16;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 13' 45" West, 334.47 feet to the beginning of a non-tangent curve, concave to the West, and having a radius of 2832.98 feet, and from which point a radial line bears South 89° 40' 01" West;

Thence departing said East line of said Section 16, and continuing along said existing centerline of railroad track, Northerly and to the left along the arc of said curve, 252.02 feet through a central angle of 5° 05' 49" to the end of said curve, and to which point a radial line bears North 84° 34' 11" East;

Thence continuing along said existing centerline of railroad track, North 5° 19' 34" West, 560 feet more or less to a point on the ordinary high water mark of the lower Salt River and the terminus of said 100 foot wide strip of land.

EXCEPT the east 35 feet of said strip of land.

The limits of said strip of land shall be lengthened or shortened at the Point of Beginning and Termination, and at all angle points so as to provide the specified width of land throughout.

Containing 1.856 Acres, more or less.

OFFICE OF REAL ESTATE  
OMAHA, NEBRASKA  
WRITTEN BY: JCO  
November 6, 2003  
211408.leg

**EXHIBIT “B” TO EXHIBIT “D”**

**LIST OF LEASES AND LICENSES TO BE ASSIGNED**

[INTENTIONALLY LEFT BLANK – WILL SUPPLY AT A LATER DATE]

**EXHIBIT "E" TO EXHIBIT B**

**CERTIFICATION OF NON-FOREIGN STATUS**

Under Section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust, or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. To inform the transferee, CITY OF TEMPE, that no withholding is required with respect to the transfer of a U.S. real property interest by UNION PACIFIC RAILROAD COMPANY, the undersigned hereby certifies the following on behalf of UNION PACIFIC RAILROAD COMPANY:

1. UNION PACIFIC RAILROAD COMPANY is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. UNION PACIFIC RAILROAD COMPANY'S U.S. employer identification number is 94-6001323; and
3. UNION PACIFIC RAILROAD COMPANY'S office address is 1416 Dodge Street, Omaha, Nebraska 68179, and place of incorporation is Delaware.

UNION PACIFIC RAILROAD COMPANY agrees to inform the transferee if it becomes a foreign person at any time during the three year period immediately following the date of this notice.

UNION PACIFIC RAILROAD COMPANY understands that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this Certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of UNION PACIFIC RAILROAD COMPANY.

UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**EXHIBIT C**

**MEMORANDUM OF OPTION**

Recording requested by,  
and when recorded, mail to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

---

(Space above line for Recorder's use only)

APN \_\_\_\_\_

This instrument is exempt from Affidavit  
and Filing Fees (ARS §42-1614A2)

By this Memorandum of Option ("Memorandum"), UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Union Pacific"), grants to CITY OF TEMPE, a municipal corporation created under the provisions of Arizona law ("Tempe"), an option to purchase its interest in certain real property, and any and all improvements thereon which are owned by Union Pacific, described in Exhibit A, attached hereto and incorporated herein (the "Property"). The option is more particularly described in the Option to Purchase Real Property ("Option Agreement") dated as of December 19, 2003, executed between Union Pacific and Tempe.

1. Term. The term of the Option Agreement begins on December 19, 2003, and ends on December 19, 2004 ("Term"), unless extended in accordance with the Option Agreement.
2. Extensions. A total of four (4) extensions of one year each are available to Tempe as specified in the Option Agreement.
3. Termination. The Option Agreement shall automatically terminate and shall have no further force upon the first of the following events to occur:
  - a. The purchase of the Property by Tempe; or
  - b. The end of the Term, as it may be extended.
4. Price and Terms. The parties have executed and recorded this instrument to give notice of the Option Agreement and the respective rights and obligations of Tempe and Union Pacific. The price and other terms are in the unrecorded Option Agreement, which is incorporated by reference in its entirety in this Memorandum. In the event of any inconsistency between this Memorandum and the Option Agreement, the Option Agreement shall control.

5. Assignment. Tempe's rights and obligations under the Option Agreement shall not be assigned without Union Pacific's prior written consent, which consent shall not unreasonably be withheld or delayed. Any assignment without that consent shall be void.
6. Successors and Assigns. This Memorandum and the Option Agreement shall bind and inure to the benefit of the parties and their respective heirs, successors, and assigns, subject, however, to the provisions of the Option Agreement on assignment.
7. Governing Law. This Memorandum and the Option Agreement are governed by Arizona law.

Union Pacific has signed this Memorandum as of December 19, 2003.

UNION PACIFIC RAILROAD COMPANY.  
a Delaware corporation

By \_\_\_\_\_  
Title:

Attest:

\_\_\_\_\_  
Assistant Secretary

**EXHIBIT "A" TO EXHIBIT C**

**UNION PACIFIC RAILROAD COMPANY  
Maricopa County, Arizona**

**(First Street Property)**

A portion of the East half of Section 16, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at the Southeast corner of said Section 16;

Thence along the East line of said Section 16, North 00° 17' 10" West, 2230.81 feet to a point on the Easterly prolongation of the South line of Lot 31E of "State Plat 12 Amended," a subdivision recorded in Book 69 of Maps, Page 38, Maricopa County Recorder, said point also being on the existing centerline of railroad track, and also being the Point of Beginning of a strip of land 100 feet in width, the Easterly line of which is described herein;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 17' 10" West, 409.00 feet to the East quarter corner of said Section 16;

Thence continuing along said East line and said existing centerline of railroad track, North 00° 13' 45" West, 334.47 feet to the beginning of a non-tangent curve, concave to the West, and having a radius of 2832.98 feet, and from which point a radial line bears South 89° 40' 01" West;

Thence departing said East line of said Section 16, and continuing along said existing centerline of railroad track, Northerly and to the left along the arc of said curve, 252.02 feet through a central angle of 5° 05' 49" to the end of said curve, and to which point a radial line bears North 84° 34' 11" East;

Thence continuing along said existing centerline of railroad track, North 5° 19' 34" West, 560 feet more or less to a point on the ordinary high water mark of the lower Salt River and the terminus of said 100 foot wide strip of land.

EXCEPT the east 35 feet of said strip of land.

The limits of said strip of land shall be lengthened or shortened at the Point of Beginning and Termination, and at all angle points so as to provide the specified width of land throughout.

Containing 1.856 Acres, more or less.

OFFICE OF REAL ESTATE  
OMAHA, NEBRASKA  
WRITTEN BY: JCO  
November 6, 2003

211408.leg

## **EXHIBIT D**

### **Property Disclosures**

1. All matters set forth in the 1990 Phase I report completed for the City of Tempe, including without limitation: (a) the presence of squatters on the Property, who contend that they have homestead claims to the Property; (b) stained soil which suggests possible contamination; (c) possible contamination by PCB's; (c) possible asbestos in buildings; and (d) potential for hazardous spillage due to unknown uses by squatters.
2. Possible claims of adverse or prescriptive rights by occupants of the Property.
3. The fact that the current tenant on the Property, Thoren's Showcase and Fixture Company, is in default due to its failure to pay rent, and that said tenant claims ownership of the Property; Union Pacific has provided to Tempe copies of letters from said tenant's attorney dated May 20, 2003, and June 2, 2003, as well as Union Pacific's response letter of June 27, 2003. \_\_\_\_
4. The fact that Union Pacific's interest in the Property pursuant to the 1875 Congressional Land Grant, and said Property is subject to the terms and conditions of said grant.
5. The fact that the State of Arizona may claim rights in the Property, including without limitation, a reversionary interest. \_\_\_\_\_